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IN THE
Supreme Court of the United States

October Term 1970
No. 133

UNITED STATES OF AMERICA,

Appellant,

vs.

THIRTY-SEVEN (37) PHOTOGRAPHS, MILTON LUROS,
Claimant,

Appellees.

On Appeal From the United States District Court for the
Central District of California.

BRIEF FOR APPELLEES.

Questions Presented.

1. Whether 19 U.S.C. §1305, prohibiting an adult from importing an obscene book or picture for private reading or viewing, is facially unconstitutional because of overbreadth, contrary to the provisions of the First and Fifth Amendments and the ruling in *Stanley*, and whether appellees had standing to challenge the validity of the statute.

2. Whether 19 U.S.C. §1305 is facially unconstitutional, in violation of the First and Fifth Amendments and the ruling in *Freedman* and other related decisions, because of the failure to provide the proce-

dural safeguards essential for the protection of freedom of expression.

3. Whether 19 U.S.C. §1305, on its face and as construed and applied to the importation of obscene materials for distribution solely to willing adults, without dissemination to minors or obtrusively forced upon unwilling recipients, violates the free speech and press, due process, and equal protection provisions of the First and Fifth Amendments, contrary to the rulings in *Redrup*, *Stanley* and *Rowan*.

4. Whether 19 U.S.C. §1305, which purports to vest in Customs officials discretion to seize all media of expression without any prior adversary hearing, violates the free speech and press and due process provisions of the First and Fifth Amendments.

5. Whether the provisions of 19 U.S.C. §1305 violate the free speech and press, due process, and equal protection provisions of the First and Fifth Amendments because the Congressional enactment is without rational basis or empirical support, and provide vague, ambiguous, uncertain and unascertainable standards for judging what books, pictures, or other media of communication may be imported into the United States.

Statement.

On October 24, 1969, Customs agents in Los Angeles, California, seized from the appellee Lueros, a citizen of the United States, a book, album, magazine and thirty-seven photographs [A. 15-16]. Appellee Lueros was returning to this country following a visit to Europe and the material was seized upon his return. On October 31, 1969, the District Director of the Bureau of Customs advised that the Bureau had referred

the matter to the United States Attorney for the Central District of California for forfeiture action [A. 16]. On November 4, 1969, the attorney for appellees wrote to the District Director of the Bureau of Customs requesting the forthwith delivery of the seized material. On November 5, 1969, the United States Attorney, by his assistant, released to attorney for appellees all the material which had been seized by Customs except the thirty-seven photographs [A. 16]. On November 6, 1969, the Government filed its complaint seeking judicial approval to enforce the forfeiture of the photographs [A. 2-3]. On November 14, 1969, appellees filed their answer and counterclaim [A. 3-9, 16]

Pursuant to the prayer of the appellees contained in their counterclaim, a three-judge district court (Ferguson, Barnes, Curtis, JJ.) was convened pursuant to 28 U.S.C. §§2282 and 2284 to determine whether the Government should be enjoined from enforcing 19 U.S.C. §1305 [A. 9-13]. On January 27, 1970, the three-judge court rendered an opinion [A. 24-27], holding that 19 U.S.C. §1305, in the light of the rulings by this Court in *Stanley v. Georgia*, 394 U.S. 557 and *Freedman v. Maryland*, 380 U.S. 51, on its face and as construed and applied violates the rights guaranteed to appellees under the free speech and press and due process provisions of the First and Fifth Amendments.

The court held that 19 U.S.C. §1305 clearly violates the freedom of speech and press provisions of the First Amendment. The statute, contrary to *Stanley*, "prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which is constitutionally protected" [A. 25]. The court also held that claimant had standing to attack the

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validity of the statute because of its broad sweep, despite the admission of claimant that it was his intention to incorporate the pictures in a book for distribution [A. 25]. The court also held that the statute failed to provide the procedural safeguards required under the First and Fifth Amendments and the ruling of the court in *Freedman v. Maryland*. "Section 1305 is a system of censorship by customs agents which is barren of safeguards" [A. 26].

There were additional objections made to the validity of the statute by claimant which were not reached by the court. The claimant urged that the statute was invalid because it purported to forbid the importation of explicit sexual materials for distribution to willing adults, the distribution to be made in such a manner as not to intrude upon the sensitivities or privacy of the general public or for dissemination to minors. "Without rejecting this argument, we decide the case based upon the narrowest construction of *Stanley*" [A. 25]. The court also declined to consider as unnecessary the attack on the constitutionality of §1305 because of the failure to provide for an adversary hearing prior to seizure by Customs officials, and because of the vagueness of the law [A. 26].

Accordingly, and in accordance with the findings of the district court, a judgment was entered [A. 27-28], restraining and enjoining the Government from enforcing the provisions of 19 U.S.C. §1305 against appellees; directing the return of the photographs; and declaring that the statute on its face and as construed and applied violates the constitutional rights of appellees. This appeal followed [A. 29].

Summary of Argument.

I.

The appellant initially bases its argument on the broad "commerce" powers of Congress and the allegedly limited scope of *Stanley*.

It does not meet the issue to stress the powers of Congress delineated in the Constitution. It has been constantly reiterated by the Court that broad as the commerce, postal or tax powers of Congress may be, they are circumscribed by the requirements of the First Amendment. The federal government does not have the power to prevent the importation of books or other media of expression which are not obscene, and the existence of a power to prevent the importation of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power.

A. Although the case below was decided "upon the narrowest construction of *Stanley*", appellant has chosen to discuss the scope of *Stanley* in broader terms, relying principally on the arguments advanced in the government's brief *amicus curiae* in *Byrne v. Karalexis*. The gist of appellant's argument is that *Stanley* means no more than the private right of an individual to possess obscene matter in his home.

The brief for appellee in *Reidel*, the companion case herein, details the answers to the government's arguments in *Byrne*. In substance, appellees contend that even before the ruling in *Stanley*, the Court had already indicated that obscenity could not be deemed outside the protection of the guarantees of the First Amendment in all contexts. In decisions subsequent to *Roth* and culminating in *Redrup*, the Court summa-

rized the only interests of the State which might be sufficiently compelling to authorize a limitation on the distribution of obscene utterances, to wit: a specific and limited state concern for juveniles; the prevention of assaults upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it; and "pandering" of the sort the Court found significant in *Ginzburg*.

The right to receive information and ideas, regardless of their social value, was the fundamental right which the Court sought to protect in *Stanley*, although that basic right took on an "added dimension" in the context of the case. In *Stanley*, the Court could find no countervailing state interest justifying restriction of this fundamental right. The label of "obscenity" was insufficient; the right to control the moral content of a person's thoughts was unacceptable; the assertion by the State that exposure to obscene materials may lead to antisocial or criminal behavior was rejected. The only evils which the State might have a right to prevent, the distribution of obscene materials to minors or obtrusive forcing upon unwilling recipients, were not present in the context of private consumption of ideas and information.

The government conceded in *Reidel* and *Rowan* that a constitutional right to receive information and ideas includes a corresponding right of dissemination. Many legal commentators and a considerable number of lower courts have construed *Stanley* as protecting the right to receive and the right to distribute obscene materials to adults for their private consumption. Congress itself, under the Postal Reorganization Act, has drawn the line, under the Constitution, between will-

ing adults and those upon whom material is obtrusively forced. The rulings in *Redrup*, *Stanley* and *Rowan* in similar fashion recognize the same constitutional distinction.

B. On the issue decided by the court below, appellant urges that *Stanley* does not extend to importation "even for avowedly personal use". It is urged that no citizen has a "right to be let alone" by Customs. The question here, however, is not whether Customs has the right to inspection, but whether Customs has a right to confiscate books and papers intended solely for private use by an adult. There does not appear to be any compelling state interest which can justify prohibition of an adult citizen's acquisition of materials abroad to be brought back to this country for his own private use. While appellant concedes that dissemination which is "consensual, adult and private in nature" should not as a matter of policy be infringed by postal or customs agencies, appellant nevertheless urges that importation for private use should not receive constitutional protection because of difficulties in the administration of the Customs process. *Stanley* held that such a contention was untenable, presenting neither a compelling nor necessary legitimate state interest justifying an abridgment of a fundamental liberty.

II.

Appellant apparently concedes that if importation for viewing is an activity which is constitutionally protected, then 19 U.S.C. §1305 is overbroad and facially invalid under the First Amendment. It is settled that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.

Appellant also recognizes that the overwhelming weight of authority supports appellees' standing to challenge the constitutional validity of the statute. The argument of appellant that one has standing to challenge statutes only when the laws are both vague and overbroad has no decisional support. The argument that appellee's conduct is "hard-core" is clearly untenable. The record is clear that the photographs were to be incorporated into a book, *The Kama Sutra*, already distributed widely throughout the nation. The material was intended only for willing adults and was not being imported for distribution to minors or to be thrust upon unwilling viewers. Indeed, the statute, as contended by appellees, is additionally overbroad because it infringes upon the right to import explicit sexual materials for dissemination solely to willing adults, an issue not reached by the court below.

In the ultimate sense, appellant's argument comes down to a request for this Court to engage in rewriting and "restrictive interpretation". The line, however, in the First Amendment area, between "commercial" and "noncommercial" materials is extremely elusive. First Amendment rights are not lost because dissemination takes place under commercial auspices. Moreover, Congress, and many lower court decisions, have recognized that commercial dissemination of explicit sexual materials to willing adults for private consumption is entitled to constitutional protection. Importation, even for personal use, can take place in a variety of circumstances and include a variety of persons with whom a citizen might have various social and private relationships. The task of writing legislation today in the obscenity area, within bounds fixed by decisions of the Court and the Constitution, is committed to Congress.

III.

The provisions of 19 U.S.C. §1305 clearly fail to meet the constitutional standards and criteria enunciated in *Freedman* to obviate the dangers of a censorship system. The statute is clearly barren of any safeguards. The court decisions do not support appellant's position. Indeed, the cases establish that the Customs procedures under the law are necessarily lengthy, time-consuming, and subject to the arbitrary and capricious decisions of officials throughout the service. The Bureau's own regulations, as epitomized in the Bureau of Customs circular, indicate that there is no time limit placed on ultimate administrative decision as to whether material is or is not "probably obscene". The discretion vested in the administrative officials, without time limits fixed by statute or by judicial rule, violates the First Amendment.

Appellees have additional contentions, not reached by the court below, with respect to the constitutional invalidity of 19 U.S.C. §1305. The statute is unconstitutional because it purports to forbid the importation of obscene material for distribution solely to willing adults. The statute also purports to vest in Customs officials discretion to seize books and other media of expression without a prior adversary hearing. Finally, appellees contend that there is no rational or other factual basis for adult censorship imposed by 19 U.S.C. §1305, and that the statute therefore abridges the exercise of freedoms of speech and press, arbitrarily deprives persons of their liberty and property without due process of law, and discriminatorily denies persons the equal protection of the laws, contrary to the provisions of the First and Fifth Amendments.

ARGUMENT.

I.

The District Court Correctly Concluded That United States Code, Title 19, Section 1305, Which Prohibits an Adult From Importing an Obscene Book or Picture for Private Reading or Viewing, Is Facially Unconstitutional Because Overbroad, in Violation of the First and Fifth Amendments and the Rulings of the Court in *Redrup*, *Stanley* and *Rowan*. The Power of Congress to Regulate Commerce Is Circumscribed by the Requirements of the First Amendment, Both With Respect to Importation of Obscene Materials for Personal Use or for Distribution Solely to Willing Adults.

The appellant initially hinges its argument on the power of Congress to regulate "commerce" under Article I, Section 8 (Appellant's Br. 9-10). The commerce powers of Congress, like the postal and tax powers, are, of course, delineated in the Constitution, but they have been held to be circumscribed by the First Amendment. *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 389-390; *Lamont v. Postmaster General*, 381 U.S. 301, 306; *Murdock v. Pennsylvania*, 319 U.S. 105, 112-117. "It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional." *Speiser v. Randall*, 357 U.S. 513, 518.¹

¹Appellant states that Congress has prohibited importation "of various types of obscene material" into this country since 1842 (Appellant's Br. 10). The Tariff Act of 1842, insofar as "obscenity" is concerned, has had a checkered career. See, Paul and Schwartz, *Federal Censorship: Obscenity in the Mail* (1961), 12-17, 23-24, 39-43, 46-49, 55-62, 64-67, 68-69, 87-91, 117-125, 126-130, 160-162, 169-172. It emerged in the Nineteenth Century when, with the prodding of Anthony Comstock and the

It does not meet the issue here to argue that obscene material is "merchandise", without protection of the First Amendment and "fully subject to the government's power to exclude". (Appellant's Br. 10). It is plain, for example, from at least the decision of Judge Woolsey in *Ulysses* to the decisions of the Court in *Central Magazine Sales* and *Potomac News Co.*, that the holding in *Roth* does not recognize any power in the federal government to prevent the importation of books or other media of expression which are not obscene. Moreover, the existence of a power to prevent the importation of obscene matter "does not mean that there can be no constitutional barrier to any form of practical exercise of that power". *Smith v. California*, 361 U.S. 147, 152, 155.

The specific holding of the court below was that Title 19 U.S.C. §1305 is facially unconstitutional be-

Hicklin rule, the focus of law shifted from the personal behavior of an accused to the ideas or the content of his expression. Customs generally promulgated its own rulings with respect to what expression was unfit for importation and the practice, still existing, of writing a letter to the person importing the material, advising him that the Customs Bureau considers the materials to be "obscene" and requesting assent to administrative forfeiture of the materials, resulted generally in cutting down litigation and enlarging the powers of the Customs censorship. Thus, at one time or another, in the past Balzac's *Droll Stories*, *The Decameron*, *The Golden Ass* of Apuleius, Flaubert's *Temptation of St. Anthony*, George Moore's *Story Teller's Holiday*, *Lady Chatterley's Lover*, Anatole France's *The Gods are Athirst*, *The Well of Loneliness* and *Ulysses* were denied clearance. The later discretion vested in the Secretary of the Treasury to admit "classics" did not aid Henry Miller's *Tropic of Cancer* or *Tropic of Capricorn*. See, *Besig v. United States*, 208 F. 2d 142 (9 Cir. 1953). Cf., *United States v. One Book Entitled "Ulysses"*, 72 F. 2d 705 (2 Cir. 1934), affirming 5 F. Supp. 182 (D.C. N.Y. 1933), opinion by Woolsey, J. See also, *Central Magazine Sales v. United States*, 389 U.S. 50, reversing, based on *Redrup*, a judgment of forfeiture of imported magazines, 373 F. 2d 633 (4 Cir. 1967); *Potomac News Co. v. United States*, 389 U.S. 47, reversing 373 F. 2d 635 (4 Cir. 1967); *Grove Press v. Gerstein*, 378 U.S. 577.

cause of its overbreadth. The statute prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which under *Stanley v. Georgia*, 394 U.S. 557 is constitutionally protected. The right to read necessarily protects the right to receive. The statute here prohibits a person who may constitutionally view pictures of the right to receive them [A. 25].³

A. Although the case herein was decided below "upon the narrowest construction of *Stanley*" [A. 25], the appellant has chosen initially to discuss the scope of *Stanley* in broader terms (Appellant's Br. 10-14). The appellant calls attention to the government's brief *amicus curiae* in *Byrne v. Karalexis* to support its thesis that "the opinion's focus [was] on the privacy of the individual whose possession of obscene matter was there made a crime" (*Ibid.* 10-14). The brief for appellee in the companion case herein, *United States v. Reidel*, No. 534, develops fully the answers to the arguments of the government in its *amicus* brief in *Byrne*. Only the substance of appellee's arguments is, therefore, set forth here.

The fundamental premise of *Roth* was that obscenity was outside the area of constitutional protection because "utterly without redeeming social importance". Relying upon *Beauharnais*, 343 U.S. 250 and *Chaplin*, 315 U.S. 568, the Court rejected all claims that the prevention and punishment of obscene utterances raised any constitutional problems. The Court emphasized, however, that the standards for judging

³The district court relied on *Stanley* and *Lamont*. It is not without significance that the briefs of appellant in both *Reidel* and the case herein omit any mention of the *Lamont* and *Rowan* decisions.

obscenity must safeguard the protection of freedom of speech and press for material which was not obscene as defined by the Court. In succeeding decisions, the Court stressed that the holding in *Roth* did not recognize any state power to restrict the dissemination of books which were not obscene; the power to regulate obscene matter was limited by the requirements of the First Amendment.

The vagueness and ambiguity of the standards for judging obscenity, and the difficulty of applying such standards in particular cases, led to the suggestion in *Jacobellis v. Ohio*, 378 U.S. 184 that laws aimed at preventing distribution of objectionable material to children would better serve the state interest than the total prohibition of dissemination of alleged obscene material. In *Ginzburg v. United States*, 383 U.S. 463, the Court suggested a second state interest which might justify a limitation on the dissemination of explicit sexual materials. If the conduct of the publisher was such as to obtrusively proclaim the obscenity of the material, then such obtrusive conduct might be prohibited. In *Redrup v. New York*, 386 U.S. 767, after reversing the judgments in all three cases, the Court summarized the interests of the State which might be sufficiently compelling to authorize a limitation on the distribution of obscene utterances: A specific and limited state concern for juveniles; prevention of assaults upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it; "pandering" of the sort which the Court found significant in *Ginzburg*.

Thus, even before the ruling in *Stanley*, the Court had already indicated that obscenity could not be deemed outside the protection of the guarantees of the

First Amendment in all contexts. The impact of *Beauharnais* had also been considerably lessened by the ruling in *New York Times Co. v. Sullivan*, 376 U.S. 254, and *Chaplinsky* had come to be limited by subsequent rulings of the Court to only those provocative words likely to cause "a breach of the peace".

The right to receive information and ideas, regardless of their social value, was the fundamental right which the Court sought to protect in *Stanley*, although that basic right took on an "added dimension" in the context of the case. The assertion of a governmental interest in dealing with the problem of obscenity could not in every context, the Court stated, be insulated from all constitutional protections. "Neither *Roth* nor any other decision of this Court reaches that far". 394 U.S. at 563. "This right to receive information and ideas, regardless of their social worth, * * * is fundamental to our free society." 394 U.S. at 564.

In *Stanley* the Court could find no countervailing state interest justifying restriction of the aforesaid fundamental rights. The mere categorization of the material as "obscene" was insufficient; the claim that the State had the right to control the moral content of a person's thoughts was inconsistent with the philosophy of the First Amendment; the assertion by the State that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence was rejected because "among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law." The only evils which the State might have a right to prevent, the distribution of obscene material to minors or the distribution in such a manner as to invade the privacy or sensibilities of the general public, were not present

in the context of private consumption of ideas and information. 394 U.S. at 565-567.

The government insists in its brief *amicus curiae* in *Byrne v. Karalexis* that *Stanley* recognized no constitutional "right to receive" obscene materials; that, in effect, the dissemination of explicit sexual materials to a willing adult like Stanley for his private consumption was without First Amendment protection. In reaching this conclusion, the appellant appears to ignore the statement repeated three times in the *Stanley* opinion that the basic constitutional right involved was the "right to receive information and ideas, regardless of their social worth". The *Stanley* opinion pointed to the decisions in *Martin v. City of Struthers*, *Griswold* and *Lamont* as cases which stress that freedoms of speech and press embrace the right to distribute all media of communication and necessarily protect the right to receive it. The right to receive information is included in the scope of the First Amendment protection because the receipt of information furthers the basic policies embodied in the Amendment. Dissemination is protected because the recipient is entitled to information about all issues, to enable him to cope with the exigencies of his time.

In *Reidel*, the government conceded that if a constitutional right to receive obscene material is recognized in *Stanley*, then clearly there is bound to be a corresponding right of dissemination. In *Rowan*, the government in fact cited *Stanley* in its brief to support the proposition that freedoms of speech and press "embrace the rights necessary to effectuate those freedoms, including the right to circulate and receive publications, the right to listen and the right to read". (Respondent's Br. p. 31). Virtually all legal commentators have stressed

the significance of *Stanley* as protecting the right to distribute and the right to receive obscene materials by adults for private consumption. Many courts throughout the Nation have construed *Stanley* as based upon a constitutional right to receive obscene material for private use. It has been constantly reiterated that if the government has no substantial interest in preventing a citizen from reading books and watching films in the privacy of his home, then clearly it can have no greater interest in preventing or prohibiting him from acquiring them. The courts have stated that it would be illogical under the First Amendment to make legal the possession of materials which could only be purchased illegally.

As heretofore stated, the foregoing arguments were detailed in appellee's brief in *Reidel*. It was additionally noted in that brief that even in the area of conduct, as distinguished from expression, there have been changing concepts by both legislatures and courts with respect to sexual practices not involving force, adult corruption of minors, or public affront. Moreover, the Report of the Commission on Obscenity and Pornography, which was submitted in September of 1970, not only supports the conclusions in *Stanley*, but emphasizes that the premises upon which adult censorship rested in the past have no basis in fact. And finally, Congress has made provisions to protect those legitimate interests which the federal government may have under the Constitution to regulate obscenity. Under the Postal Reorganization Act, unwilling adults on behalf of themselves and their children may prevent the sending of unsolicited mail, and civil and criminal sanctions are contained in the laws against those who disseminate obtrusively to unwilling recipients. The adult citizen remains free under Congressional legislation to receive

whatever material he desires, without consequences to the recipient or to the distributor. The rulings in *Redrup*, *Stanley* and *Rowan* are judicial counterparts of the legislative determination that the line must be drawn, under the Constitution, between willing adults and those upon whom material is obtrusively forced.

While appellant states here that it intends to expand upon "our analysis in *Byrne*" (Appellant's Br. 11), its discussion proves to be no more than a reiteration of the position advanced in *Byrne*. It is urged that *Stanley* was only intended to protect the privacy of the accused in that case, and not intended to protect any right to receive obscenity for his private consumption.

Stanley makes clear that even though material may be described as "obscene", such label does not derogate from the individual's right to receive it. *Stanley* asserts the fundamental principle that the right of an adult to the private consumption of ideas and information includes the right to acquire such ideas and information. It is an empty right which an adult enjoys to read a book or view a film in his home without the opportunity to acquire such book or film lawfully. If *Martin v. Struthers*, 319 U.S. 141 and *Lamont*, as well as *Stanley*, state any fundamental position, it is that to willing adults the distribution and the receipt of explicit sexual materials are vital to the preservation of the First Amendment freedoms guaranteed to "Mr. Stanley".

If an adult has a right under the First Amendment to the private possession of obscene materials, as conceded by *Stanley* holds, then appellant has presented no compelling and legitimate federal interest which would justify limiting his right to receive such material. Where material is being distributed to a willing adult, and is

not designed or intended for minors, or obtrusively forced upon unwilling recipients, there is no substantial governmental interest which would justify shutting off all avenues for the willing adult to obtain the material the Constitution states he has a right to possess.

B. Departing from its broad discussion of *Stanley*, appellant now turns to the argument that "the *Stanley* rationale does not extend to importation even for avowedly personal use" (Appellant's Br. 15).³ It is urged that no citizen has a "right to be let alone" by Customs; that for more than one hundred years Customs has traditionally examined an individual's luggage, and cases are cited involving attempts to smuggle heroin, intoxicating liquors, stolen goods, or goods liable for duties across the borders (Appellant's Br. 15). It is then concluded that "books and papers may be examined if for no other reason than to see what may be concealed between their leaves" (Appellant's Br. 15).

³The appellant states that the "question need not be reached in this case" (Appellant's Br. n.3). The precise ruling of the district court is that the statute was too broad because it prohibited an adult from importing an obscene book or picture for private reading or viewing. Plainly, the question is one which is reached in this case. In the decision of the district court in *United States v. Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (D.C. N.Y. 1970), appeal dismissed (Oct. Term 1970, No. 778, Dec. 7, 1970) it was held that 19 U.S.C. §1305, as applied to importation of obscene materials by a citizen concededly for his own private use, was unconstitutional. The court concluded that a statute which by its terms prohibits importation by an individual of obscene material for his own private use and enjoyment in his own home offends the First Amendment. The district court declined to meet as unnecessary in that case, the issue of overbreadth. The court did suggest that obscene material, in certain situations, can now apparently invoke constitutional protection under *Stanley*, and for that reason 19 U.S.C. §1305 may be unconstitutional, even as it applies to importation for commercial distribution, in the absence of a government showing that one of the legitimate state interests summarized in *Redrup* will be infringed by commercial distribution subsequent to importation.

Clearly, this ignores the real issue presented here. Even if books and papers may be inspected by Customs, it does not follow that books and papers may be confiscated and denied to citizens for private use if nothing is found between the leaves. Nor does it meet the issue to state that Customs procedures are procedures *in rem*; that no crime is charged; and that Congressional power to exclude is complete, "save as it may be protected by the Constitution" (Appellant's Br. 15-16).

If an adult citizen has the right to read or view obscene materials for his private use under the Constitution, what compelling state interest can appellant offer to justify prohibition of his acquiring such material abroad and bringing it back with him to this country for his own private use? It does not advance appellant's argument to assert that the material is "obscene". However "obscene" a book may be, that book in the possession of an adult citizen for his own private use is entitled to constitutional protection, not only under *Stanley* but under the free speech and press guarantees of the First Amendment to the Constitution of the United States.

Finally, the appellant argues that "public morality" may be threatened even by importations avowedly for personal use. It appears that if material is found by accident hidden in a desk in a private home, "one may have considerable confidence that it is meant only for private use" (Appellant's Br. 16). No such confidence, it is alleged, is possible when the material is at the "country's borders". It is argued that there is a "danger of false statements" and that there are limitations on information available to the Customs officials "regarding actual intended use".

In short, the individual's right to read or observe what he pleases, a right "so fundamental to our scheme of individual liberty", is to be restricted because of alleged need to ease the administration of the Customs process. Cf., *Stanley v. Georgia*, 394 U.S. at 567-568. This, it is submitted, is neither a compelling nor necessary legitimate state interest justifying an abridgment of a fundamental liberty.⁴

It should be noted that 19 U.S.C. §1305 permits the importation of obscene "classics" for personal use. It is also to be noted that in *United States v. 31 Photographs*, 156 F. Supp. 350 (D.C. N.Y. 1957), it was held that despite the provisions of 19 U.S.C. §1305 obscene material could be imported by "qualified scholars engaged in bona fide research". The Government took no appeal from the judgment. A learned commentator has stated:

"It should be added that not only is the prohibition of erotic materials, voluntarily sought by adults, incompatible with a system of freedom of expression, but such censorship is futile and discriminatory as well. Our society is crammed full of sexually stimulating reading matter, sights and events. It is literally impossible for the government to suppress all stimuli that may arouse sexual excitement, any more than it can eliminate sex. Nor can it suppress even the most erotic without

⁴In *Stanley*, the Court observed that among free men, "the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law" (394 U.S. at 566-567). See, 19 U.S.C. §§1509, 1510. See also, 18 U.S.C. §1001. The appellant concedes that dissemination which is "consensual, adult and private in nature" should not as a matter of policy be infringed by postal or Customs agencies, but argues that this is not a "constitutional requirement". (Appellant's Br. 17, fn. 4).

eliminating much of the world's literature and art. The consequence is, as already noted, that the impact of obscenity laws falls primarily, or would if the laws could be enforced, upon particular groups in our society who happen not to prefer or be able to afford elite pornography." Emerson, *The System of Freedom of Expression*, 499-500 (1970).

We do not deal here with "solicitors for gadgets or brushes" (Appellant's Br. 20, fn. 6). We deal here with expression ordinarily protected by the provisions of the First Amendment. The fact that material intended for one use may be used for other purposes once "past the customs barrier" (Appellant's Br. 16) is not a reason for resorting to customs censorship and suppression of expression imported for private consumption or for distribution to willing adults entitled to freedom from governmental interference under the First Amendment and *Stanley*. On the other hand, if such material is designed or intended for minors or obtrusively forced upon unwilling recipients, then the federal and state governments have adequate recourse.⁸ The administration of the customs statute by customs officers cannot be, it is submitted, a compelling state interest justifying the suppression of activities protected by the provisions of the First Amendment.

⁸"The statutes of forty-one jurisdictions contain some type of special prohibition regarding distribution of erotic material to young persons. Eighteen of these statutes are either identical to or closely patterned after the New York statute upheld in *Ginsberg v. New York*." The Report of the Commission on Obscenity and Pornography, September 1970 (U.S. Government Printing Office, 330). See also in the same report: "Existing federal and state obscenity prohibitions—their content and enforcement," 328-339.

II.

Appellees Clearly Have Standing to Challenge United States Code, Title 19, Section 1305 as Overbroad and Therefore Unconstitutional, Where the Statute Reaches All Obscene Works and Sweeps Within Its Ambit Activity Which Is Constitutionally Protected Under the First and Fifth Amendments and the Rulings of the Court in Redrup, Stanley and Rowan.

The appellant apparently agrees that if the importation of an obscene book or picture for private reading or viewing is an activity which is constitutionally protected, then 19 U.S.C. §1305 is an overbroad statute and facially invalid under the First Amendment. Indeed, the entire burden of appellant's argument is that 19 U.S.C. §1305 reaches all obscene works. Appellant's somewhat tentative contention is that appellees lack "standing" to challenge the overbroad law.⁶

The rationale for the condemnation of overbroad statutes in the First Amendment area has been stated on numerous occasions by this Court and lower courts. The stress by the judiciary has been upon an overriding duty to protect all persons from the chilling effect upon the exercise of First Amendment freedoms generated by such overbroad statutes. The reason for invalidating an overbroad statute is to terminate its

⁶The appellant complains that the court below ignored the "separability" clause in the Customs statute, 19 U.S.C. §1652. Overbreadth is constitutionally fatal because the legislature has enacted a statute susceptible to sweeping and improper application, and overbroad statutes have been stricken by the courts in their entirety because violative of the First Amendment, wholly apart from the particular motives or intentions of the legislature. See, Note, Inseparability in Application of Statutes Impairing Civil Liberties, 61 Harv.L.Rev. 1208, 1213 (1948). See also, *Smith v. California*, 361 U.S. 147, 151.

deterrence of constitutionally protected activity. An overbroad statute by its very presence tends to create a self-censorship, a reluctance by individuals to exercise fundamental rights which in the last analysis may deprive the community of access to ideas and information essential to cope with the problems of society. Since the issue is one of deterrence of protected activities, the courts have not distinguished between overbroad penal or civil statutes.

Thus, it has been stated: "Appellant's challenge is not that the statute is void for 'vagueness', that is, that it is a statute 'which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . .'. Rather, his constitutional attack is that the statute, although lacking neither clarity or precision is void for 'overbreadth', that is, that it offends the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms'." *Zwickler v. Koota*, 389 U.S. 241, 249-250. "It is a familiar and basic principle, . . . that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms'." *Aptheker v. Secretary of State*, 378 U.S. 500, 508. "It has become axiomatic that 'precision of regulation must be the touchstone in an area so closely touching our most precious freedoms'. Thus, §5(a)(1)(D) contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for asso-

ciation which may not be proscribed consistently with First Amendment rights . . . This the Constitution will not tolerate." *United States v. Robel*, 389 U.S. 258, 265-266. "Broad prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97.

See also, *Smith v. California*, 361 U.S. 147, 151-152; *Cantwell v. Connecticut*, 310 U.S. 296, 304-307; *Dombrowski v. Pfister*, 380 U.S. 479, 486-487; *Freedman v. Maryland*, 380 U.S. 51, 56; *Keyishian v. Board of Regents*, 385 U.S. 589, 609; *Baggett v. Bullitt*, 377 U.S. 360, 372-373; *Martin v. City of Struthers*, 319 U.S. 141, 143-144; *Kunz v. New York*, 340 U.S. 290, 293-294; Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 852-858 (1970); Note, The Chilling Effect in Constitutional Law, 69 Colum. L. Rev. 809, 813 (1969).

The appellant's argument that appellees lack standing to challenge the constitutional validity of the statute is cast in very limited terms. The appellant concedes that "when First Amendment freedoms" are involved, the Court has "'allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity'" (Appellant's Br. 18-19). It is conceded that the reason for the rule is the possible "'chilling effect'" of such statutes on the exercise of First Amendment rights (*Ibid.* 19). It is also conceded by appellant that appellee has standing to challenge the procedures of §1305 because, according to appellant, the sweep-

ing nature of the procedures of some statutes may substantially inhibit the rights of those who may be entitled to First Amendment protection (*Ibid.* 19, fn. 5). In making all of these concessions, appellant is doing no more than recognizing the overwhelming weight of authority which supports appellees' standing to challenge the statute herein for overbreadth. *Thornhill v. Alabama*, 310 U.S. 88, 97-98; *NAACP v. Button*, 371 U.S. 415, 432-433; *Dombrowski v. Pfister*, 380 U.S. 479, 486-487; *Freedman v. Maryland*, 380 U.S. 51, 56; Note, *supra*, 83 Harv. L. Rev. at 857, n. 55.

The argument of appellant comes down to the mere contention that one has standing only to challenge statutes which are both "vague" and "overbroad". According to the government, it is only the vagueness which causes the "chilling effect" in overbreadth (Appellant's Br. 19-20). There is no merit to this attempted distinction, it is submitted. Overbreadth is constitutionally fatal because the very presence of the statute and the clarity of its terms deter citizens from the exercise of protected freedoms and because such a statute, which concededly covers privileged conduct, readily lends itself to harsh and discriminatory enforcement by officials. Of course overbroad statutes, especially in the obscenity area, have elements of vagueness in them because citizens do not know where the statute draws the line between privileged and nonprivileged conduct. There is, no doubt, therefore, that a statute like 19 U.S.C. §1305, which by its language covers all obscene material, is overbroad and may be challenged by appellees, wholly apart from the context of the particular record here. The appellant has simply chosen to disregard the decision of the Court in *Zwickler v. Koota*, 389 U.S. 241, where the Court emphasized standing of

a suitor in a federal court to challenge an "overbroad" statute as distinguished from a suitor challenging a "vague" statute. 389 U.S. at 249-250. See also, *Hiatt v. United States*, 415 F. 2d 664, 670-673 (5 Cir. 1969), cert. denied 397 U.S. 936.

In final analysis, appellant's argument on "standing" is reduced to arguing that appellee's "activity is the 'sort of "hardcore" conduct that would obviously be prohibited under any construction'" of the statute (Appellant's Br. 20), and that in any event the overbreadth of the law can be cured "by a restrictive interpretation which will avoid constitutional doubt or by excising invalid portions of the statute" (Appellant's Br. 21).

There is not the slightest evidence in the record of any "hardcore" conduct on the part of appellee. The stipulation in the record is merely that the photographs seized were intended to be incorporated in a hard cover edition of *The Kama Sutra of Vatsyayana*, a book which had been distributed widely throughout the nation and acclaimed as a work of substantial value. At least some of the photographs were intended for inclusion in the book [A. 16]. Counsel for appellees, in his letter to the District Director of the Bureau of Customs, specifically stated that "the material is not being imported for distribution to minors, nor to be thrust upon unwilling viewers" [A. 19]. It is appellee's contention that the activity in which he proposed to engage was not only constitutionally protected, but that the statute was additionally overbroad because it in-

fringed upon the right to import explicit sexual materials for dissemination to willing adults. This issue, as heretofore stated, was not reached by the court below, and the arguments in support of this contention are set forth in detail in *Reidel*, the companion case herein. In any event, on the issue of standing there can be no dispute, it is submitted, that appellees had the standing under the decided cases to challenge the constitutional validity of the law.

The final request of the appellant is that this Court should consider a cure for overbreadth by "a restrictive interpretation". This, of course, would require a wholesale rewriting by the Court and a disregard of legislative intent. The appellant attempts to draw a line between "commercial" and "noncommercial". The difficulty is that we are in the First Amendment area where lines between protected and unprotected speech, commercial and noncommercial materials, are extremely elusive. In the first place, it is "no matter that the dissemination takes place under commercial auspices". *Smith v. California*, 361 U.S. 147, 150. In the second place, both the laws of the United States, 39 U.S.C. §§3008 and 3010, and numerous court decisions have recognized that commercial dissemination of explicit sexual materials to willing adults for private consumption is constitutionally protected. See, Brief for Appellee in *United States v. Reidel*. In the third place, importation for personal use can include a wide variety of circumstances, involving various places and persons with whom a citizen might have social and private relationships. As

this Court stated in *Aptheker v. Secretary of State*, 378 U.S. 500, 515-516:

"The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting. The situation here is different from that in cases such as *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561, where the Court is called upon to consider the content of allegedly vague statutory language. Here, in contrast, an attempt to 'construe' the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage. This course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty."

See also, *United States v. Robel*, 389 U.S. 258, 267-268: "We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress."

III.

The Customs Statute, United States Code Title 19, Section 1305, Creates a Censorship System Without the Procedural Safeguards Required by the Provisions of the First and Fifth Amendments and the Ruling of the Court in *Freedman*. Although the Issues Were Not Reached by the District Court, the Statute Is Unconstitutional Because of Additional Overbreadth, Failure to Provide for an Adversary Hearing Prior to Seizure by Customs Officials, and Because No Rational or Reasonable Basis Exists for the Congressional Enactment, All Contrary to the Free Speech and Press, Due Process, and Equal Protection Provisions of the Constitution.

A. This Court has stated that any system of prior restraints of expression "Comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 70. There must be procedural safeguards designed to obviate "the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. 51, 58. Thus the burden of proving that material is unprotected expression rests on the censor; the censor must "within a specified brief period" either hold his hand or go to Court; any restraint imposed in advance of a final judicial determination must be limited to "the shortest fixed period" compatible with sound judicial resolution; and the procedure must also "assure a prompt final judicial decision." These procedural safeguards must be contained in the statute or by judicial rule. *Freedman v. Maryland*, 380 U.S. at 58-59.

The provisions of 19 U.S.C. §1305, plainly fail to meet the constitutional standards and criteria enunciated by the Court in *Freedman*. Appellant does not

make any contention to the contrary. Appellant relies upon an Administrative Circular which it contends provides "streamline" proceedings adequate to meet constitutional requirements (Appellant's Br. 26, fn. 10). In addition, it is urged that various district courts have resorted on a case-to-case basis of either approving or disapproving the length of administrative and judicial proceedings, all of which it is contended "provide the requisite assurance of a prompt determination on the issue of obscenity and, for that matter, sufficiently define 'specified brief period.'" (Appellant's Br. 26-27).

Nothing, however, referred to by appellant in its brief justifies its contention that "the procedural system in this case affords the safeguards which *Freedman* and its progeny require." (Appellant's Br. 23). In *Freedman*, the statutory procedures were held invalid. In *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (Appellant's Br. 23), a period of 50 to 57 days was held excessive (Appellant's Br. 23). The time consumed in *Exclusive* between entry and final decree was 60 days. 373 F. 2d 633, 634. In *Hellenic Sun*, the time between entry, institution of proceedings, filing of opinion, and entry of the formal order, was 41 days (Appellant's Br. 25). While periods of 176 and 209 days, respectively, were approved in "491", appellant concedes that the approval rested on the ground that most of the delay was attributable to the importer. Nevertheless, a portion of that delay was attributable to government officials. 367 U.S. 903-904. It is conceded also that in *Father Silas* periods of 98 days and 165 days were disapproved (Appellant's Br. 26). In short, appellant's reliance upon the varied rulings of the district courts is self-defeating, it is submitted. The fact is that the customs procedures under the law are necessarily

lengthy, time consuming and subject to the arbitrary and capricious decisions of officials throughout the service. In the case herein, the time consumed from seizure to the date of the Court hearing was 76 days. It was conceded "that under present statutory procedures it could not have been accomplished any sooner." [A. 26].⁷ The appellant is not aided by its reliance on the Bureau of Customs Circular (RES-15-RM, July 13, 1966). Under the regulations there contained, the first examination of any material is to be made "as soon as possible after it is available for customs examination." Then, if the first examining customs officer determines "that further review of the material is necessary at the district level," the district delegate must review the material the next day. Whenever, whether upon such first examination or subsequent review, a determination is made as to "hard core" obscenity, an assent to forfeiture shall be solicited. If the assent is not ruled on within one week or declined prior thereto, the material is referred to the United States Attorney's Office immediately. However, if the subsequent review at the district level results in a determination that the material "is probably obscene but there is no clear local, Bureau, or judicial precedent for the determination, or if some other reason exists which makes Bureau review desirable," the material must be forwarded to the Bureau of Customs at Washington, D.C. There

⁷The reference to "Quiet Days In Clichy" (Appellant's Br. 27, fn. 12) does not support appellant's contention. The time between seizure and final determination was about 100 days. Since the film was found to be not obscene, the public's right to access to constitutionally protected material had been denied for over 3 months. Reliance upon *Interstate Circuit* appears misplaced. The time between administrative classification and final determination in the trial court was 9 days, not possible under the customs statute and procedures.

does not appear to be any provision in the Circular with respect to the time provided for the Restricted Merchandise Section in Washington, D.C. to decide whether material "is probably obscene."

The short of the matter is that nothing in the statute, or the legislative history, or the regulations and judicial decisions provide any of the procedural safeguards required by the Constitution and the decisions of the Court. The appellant does not deny that the statute and regulations do not prohibit customs agents from long delaying judicial determination. The discretion vested in the administrative officials, without time limits fixed by the statute or by judicial rule, violates the First Amendment. See, *Freedman v. Maryland*, 380 U.S. 51; *Teitel Film Corp. v. Cusack*, 390 U.S. 139; *Bantam Books v. Sullivan*, 372 U.S. 58.

B. The district court, as heretofore stated, found it unnecessary to reach other issues raised by appellees in support of their claims [A. 25, 26]. Without rejecting the argument, the court passed over appellees' contention that 19 U.S.C. 1305 is unconstitutional because the statute purports to forbid the importation of obscene material even in the absence of any showing that the material is intended for distribution to minors or for distribution in a manner which intrudes upon the sensitivities or privacy of the general public [A. 25]. Appellees contend that the statute is additionally overbroad in the light of the aforesaid, and the discussion of this issue is detailed at length in the brief

for appellees in the companion case herein, *United States v. Reidel*, No. 534.

Appellees also urge the invalidity of the statute because the law purports to vest in customs officials discretion to seize books and other media of expression without an adversary hearing, in violation of the First and Fifth Amendments to the United States Constitution. *Marcus v. Search Warrants of Property*, 367 U.S. 717; *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *Lamont v. Postmaster General*, 381 U.S. 301; *United States v. 18 Packages of Magazines*, 238 F. Supp. 846 (D.C. Cal. 1964).

Finally, appellees contend that there is no rational or other factual basis for adult censorship imposed by 19 U.S.C. 1305. The enactment of the statute was based upon unfounded conclusions and premises, and the statute today abridges the exercise of freedoms of speech and press, deprives persons of their liberty and property without due process of law, and denies the equal protection of the laws contrary to the provisions of the First and Fifth Amendments. See, Conclusions and Recommendations of The Report of the Commission on Obscenity and Pornography, September 1970, United States Government Printing Office, 47-64. See also, Justice Black in *Ginzburg v. United States*, 383 U.S. 463, 478-481; Justice Douglas in *Ginzburg v. United States*, 383 U.S. at 483; Justice Harlan in *Memoirs v. Massachusetts*, 383 U.S. 413, 455-456; Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, 197; Chief Justice Warren in *Jacobellis v. Ohio*, 378 U.S. at 200-201;

Per curiam in *Redrup v. New York*, 386 U.S. 767, 770-771.

Conclusion.

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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